

¹ 5 U.S.C. § 8101 *et seq.*

would be against equity and good conscience. He stated that appellant believed that he was being paid compensation for two distinct injuries and that his belief was confirmed in writing by OWCP. Counsel further stated that appellant would suffer financial hardship in repaying the overpayment.

FACTUAL HISTORY

This case has previously been before the Board. In a September 17, 2008 decision, the Board affirmed an August 20, 2007 OWCP decision with respect to fact and amount of a \$147,346.75 overpayment of compensation for the period April 19, 1996 through December 24, 2005 due to appellant's receipt of dual compensation benefits.² The Board, however, determined that OWCP improperly found appellant to be at fault in creating the overpayment and remanded the case to determine whether he was entitled to waiver of recovery of the overpayment. On the second appeal the Board, in a March 15, 2010 order, set aside OWCP's decision dated February 13, 2009³ which found that appellant was not entitled to waiver of recovery of the \$147,346.75 overpayment.⁴ The Board found that OWCP failed to explain why it denied waiver of recovery of the overpayment and remanded the case to OWCP for consideration of appellant's monthly income and expenses and assets based on current financial information in order to determine if waiver was appropriate. The facts of the case as set forth in the Board's prior decisions are incorporated by reference.⁵

In (Form OWCP-20) dated April 22, 2010, appellant reported monthly income of \$3,951.00 which represented \$1,177.00 in social security benefits and \$2,774.00 in VA benefits. He also reported monthly expenses which included \$470.00 for mortgage, \$395.00 for food, \$40.00 for clothing, \$598.04 for utilities, \$635.90 for other expenses and \$350.00 for child support, totaling \$2,488.94 which he rounded up to \$2,489.00. Appellant had \$7,739.77 in a checking account, \$68,675.29 in a savings account and \$72,164.44 in a money market account, totaling \$148,579.50. He also submitted supporting financial documents.

² Docket No. 08-378 (issued September 17, 2008).

³ In the February 13, 2009 decision, OWCP reduced the \$147,346.75 overpayment to \$57,346.75 by compromise as full recovery of the overpayment at the established rate of \$300.00 a month would exceed appellant's life expectancy.

⁴ Docket No. 09-1157 (issued March 15, 2010).

⁵ OWCP accepted that on September 22, 1990 appellant, then a 40-year-old part-time flexible clerk/carrier, sustained lumbosacral strain and herniated disc at L3-4 and L4-5 when he fell backwards and tripped while unloading mail sacks. It authorized a laminectomy at L3-5 which was performed on February 14, 1994. Prior to the instant claim, the VA, on February 1, 1982, awarded appellant compensation beginning September 14, 1981 for 10 percent disability for a recurrent lumbosacral strain he sustained while serving in the military from February 25, 1969 through December 8, 1972. In a July 15, 1996 decision, it increased his compensation to 60 percent disability and granted entitlement to individual unemployability effective April 19, 1996. The VA found, among other things, that the evidence demonstrated an original injury sustained during service with industrial reinjury. Following the February 14, 1994 back surgery, it found that appellant was totally disabled. On March 6, 1996 the Office of Personnel Management approved his application for disability retirement. In an October 8, 1996 decision, the VA denied his request to change its July 15, 1996 decision. On December 14, 2005 appellant elected to receive compensation benefits from the VA in lieu of FECA compensation benefits effective April 19, 1996.

In a July 8, 2010 decision, OWCP denied waiver of recovery of the overpayment.⁶ It found that appellant's income exceeded expenses by more than \$50.00.⁷ OWCP found that his assets supported his ability to repay a lump sum of \$50,000.00 and thereafter monthly payments of \$450.00.

LEGAL PRECEDENT

Under section 8129 of FECA and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁸ Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁹ Section 10.434 provides that, if OWCP finds the recipient of an overpayment was not at fault, repayment will be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of [FECA], or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”¹⁰

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of FECA if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹¹ An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not

⁶ On April 6, 2010 OWCP issued a preliminary notice of overpayment finding that appellant was not at fault in creating the \$147,346.75 overpayment. It advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. In a June 22, 2010 decision, OWCP's hearing representative set aside the April 6, 2010 preliminary determination, finding that the Board's affirmance of fact and amount of overpayment and determination that appellant was not at fault in creation of the overpayment, were not subject to its review based on the Board's September 17, 2008 decision. She remanded the case to OWCP to determine whether appellant was entitled to waiver of recovery of the overpayment as directed by the Board.

⁷ The Board notes that OWCP found that appellant's mortgage was \$570.00 rather than \$470.00 and his money market account balance was \$72,165.55 rather than \$72,164.44.

⁸ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁹ 20 C.F.R. § 10.433(a).

¹⁰ *Id.* at § 10.434.

¹¹ 20 C.F.R. § 10.436. OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

exceed expenses by more than \$50.00.¹² An individual's liquid assets include but are not limited to, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹³ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.¹⁴

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; and (b) the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁵ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹⁶

ANALYSIS

The Board remanded the case for OWCP to consider whether appellant was entitled to waiver as he was without fault in creating the overpayment. On remand, OWCP requested that appellant submit financial evidence relevant to the issue of waiver of the \$147,346.75 overpayment. It reviewed the claimed income, expenses and assets provided in appellant's April 22, 2010 Form OWCP-20 and found that he had \$3,951.00 in monthly income and \$2,588.94 in monthly expenses.

As noted, an individual is deemed to need substantially all of his or her monthly income to meet ordinary and necessary living expenses when income does not exceed expenses by more than \$50.00. In this case, appellant's monthly income did exceed his monthly expenses by more than \$50.00. Further, his assets exceeded the applicable resource base. Since appellant is not deemed by law to need substantially all of his income to meet ordinary and necessary living expenses, the Board finds that recovery of the overpayment would not defeat the purpose of FECA.

The evidence further does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant contended on appeal that he believed that he was being paid compensation for two distinct injuries which was confirmed by OWCP in writing and that he would suffer severe financial hardship in repaying the overpayment. However, he submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. The Board finds,

¹² *Desiderio Martinez*, 55 ECAB 245 (2004).

¹³ *See supra* note 11.

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.437.

¹⁶ *Id.* at § 10.437(b)(1).

therefore, that OWCP properly denied waiver of the overpayment of \$147,346.75 for the period April 19, 1996 through December 24, 2005.¹⁷

On appeal, appellant further contended that an overpayment of compensation was not created in this case because he did not receive dual compensation as the compensation he received from the VA and OWCP were for two different injuries. This contention was previously considered by the Board in its September 17, 2008 decision. The Board affirmed OWCP's finding of fact and amount of overpayment based on dual payments.¹⁸ Thus, this matter is *res judicata* absent any further review by OWCP under 5 U.S.C. § 8128.¹⁹

CONCLUSION

The Board finds that OWCP properly denied waiver of the overpayment as the evidence does not establish that recovery would defeat the purpose of FECA or be against equity and good conscience.

¹⁷ With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *See Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004). As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act. *Cheryl Thomas, id.*

¹⁸ *See e.g., Robert G. Burns*, 57 ECAB 657 (2006).

¹⁹ *Id.*; *see also Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board